performance has been denied in cases when it would, contrary to expectations at the time of contracting, endanger the plaintiff's life,[20] subject him to criminal prosecution,[21] or to liability for damage caused by a great flood.[22] On the other hand, it was properly held in a recent case, *Bradley* v. *Heyward* (1908) 164 Fed. 107, in which the defendant resisted enforcement of a contract to sell all the phosphate under her land to the plaintiff, on the ground of his discovery of a quantity worth three times the purchase price, that, since the defendant must have understood the speculative nature of the contract, it should be enforced.

With the exception of cases which are really based on a mistake in reducing a verbal contract to writing,[24] the few cases of "hardship" which do not involve inequality, involve as little real hardship. Two of them can be explained, but not justified, as unprecedented extensions of the doctrine of "unclean hands."[25] And in most of the others, the actual damage to the plaintiff is so slight, or "merely technical,"[26] as in the case in which the defendant who had contracted to rebuild houses had partly rebuilt and extensively repaired them,[27] or that in which a railroad had contracted to tunnel its embankment for the benefit of land of small value,[28] or in which by a change in the character of the district the purpose of a restrictive covenant had become unattainable,[29] that the court refuses to be bound by the manifest fiction that damages are inadequate, and denies specific enforcement, sometimes further justifying its attitude on the ground that specific performance would entail a "public loss."[27]

SAVINGS BANK TRUSTS IN NEW YORK.—The New York law of savings bank deposits in trust illustrates both a response of the courts to the demand of business conditions and their reluctance to overrule previous decisions. It was held in *Martin* v. *Funk*[1] that a deposit by one person in his own name as trustee for another created a valid trust. The question was raised but left unanswered whether surrounding circumstances might not be shown to vary the apparent intention of the depositor. Later, in discussing that question, Andrews, J., said that the character of such a transaction, as creating a trust is not conclusively established by the mere fact of the deposit.[2] In a case in which a *gift* of a bank deposit was sought to be established,[3] he applied this view. Attention was called to the com-

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[20]Williamson *v.* Dils (1903) 114 Ky. 962.

[21]Hope *v.* Walter, L. R. [1900] 1 Ch. 257.

[22]Waite *v.* O'Neill (1896) 72 Fed. 348.

[24]Talbot *v.* Ford (1842) 3 Sim. 173, 175; Wedgewood *v.* Adams (1843) 6 Beav. 600, 604.

[25]Twining *v.* Morrice (1788) 2 Bro. Ch. C. 326; Dowson *v.* Solomon (1859) 1 Drew. & S. 1.

[26]See Jackson *v.* Stevenson (1892) 156 Mass. 496.

[27]City of London *v.* Nash (1747) 1 Ves. Sr. 12.

[28]Murfeldt *v.* New York etc. R.R. Co. (1886) 102 N. Y. 702; but see Lloyd *v.* London etc. Ry. Co. (1865) 2 DeG. J. & S. 568.

[29]Trustees of Columbia *v.* Thatcher (1882) 87 N. Y. 311.

[1](1878) 75 N. Y. 134; followed in Willis *v.* Smyth (1883) 91 N. Y. 297 and Mabie *v.* Bailey (1884) 95 N. Y. 206.

[2]Mabie *v.* Bailey, *supra.*

[3]Beaver *v.* Beaver (1889) 117 N. Y. 421.

mon practice of depositing nominally in trust for another, or in another's name, from various motives, and it was said that "to infer a gift from the form of a deposit alone would, in the great majority of cases * * * impute an intention which never existed." The court was quite ready to adopt this reasoning in the next case involving a deposit in *trust* form,[4] and accepted the parol testimony of the depositor that he had not intended to create a trust. The disingenuous distinction was made that, in the earlier cases following *Martin* v. *Funk*,[1] the depositor had died in the lifetime of the beneficiary, leaving the account open and unexplained. What effect the death of the depositor had in securing to the beneficiary rights which had already been established by the declaration of trust, was not made clear. The distinction sufficed for the time. Deposits in trust form were open to explanation from all circumstances, and, where the nature of the transaction was left in doubt, no trust was enforced.[5] But it was clearly recognized that the intention of the depositor was alone controlling. Where that intention was unequivocally shown, a trust was enforced as to the original deposit and all additions,[6] even though the beneficiary was dead and the account had been previously withdrawn.[7] In *Matter of Totten*,[8] however, there was conflicting evidence of the depositor's intention; he had died in the lifetime of the beneficiary, but had closed the account. Clearly the case did not fall within any of the already too nicely adjusted categories. The court was again brought squarely to the question, avoided but a few months previous,[9] which had really been decided in the early cases,[10] whether the evidence furnished by such bank books, *standing alone*, creates a valid and *irrevocable trust*.

In seeking a solution of the whole problem, the Court of Appeals looked at the every day facts of savings bank deposits, concluding that money is often deposited in trust form for the purpose of establishing an account from which the depositor, who retains the pass-book, might draw if occasion should require,[11] but which would become the absolute property of the named beneficiary by a later gift of the depositor, or at his death.[12] Clearly, then, the mere fact of such deposit is equivocal, and to predicate an absolute trust upon it might defeat the intention of the depositor. But if the beneficiary is to take no interest at the time of the deposit, how could he acquire a right, in the absence of a will, at the depositor's death? Perhaps by regarding the conduct of the depositor in leaving the deposit in trust form until death as additional evidence of his original intention.

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[4]Cunningham *v.* Davenport (1895) 147 N. Y. 43; Matter of Barefield (1904) 177 N. Y. 387.

[5]Haux *v.* Savings Institution (1896) 2 App. Div. 165, aff'd, 154 N. Y. 736; Sullivan *v.* Sullivan (1900) 161 N. Y. 554; Washington *v.* Bank (1902) 171 N. Y. 166.

[6]Farleigh *v.* Cadman (1899) 159 N. Y. 169.

[7]Robinson *v.* Appleby (1902) 69 App. Div. 509, aff'd. 173 N. Y. 626.

[8](1904) 179 N. Y. 112.

[9]Matter of Barefield (1904) 177 N. Y. 387.

[10]* * * *"The case is peculiarly one to be determined by this test: did the intestate constitute herself a trustee? * * * I think this question must be answered in the affirmative, * * * I have considered the case thus far on what appears from the face of the transaction, without evidence aliunde, bearing upon the intent * * * she may have believed that the deposits might be withdrawn during her life * * * but if she did it would not change the legal effect of her acts."* Per Church, J., in Martin *v.* Funk, *supra*.

[11]McManus *v.* McManus (1904) 179 N. Y. 338, at 342.

[12]Matter of Totten (1904) 179 N. Y. 112, at 124; McManus *v.* McManus, *supra*.

But either this inference would be rebutted by any intermediate withdrawals from the deposit, or the estate of the decedent would be held liable to account for money so withdrawn—alternatives equally nullifying the depositor's purpose. Therefore if the court did not wish to overrule the decisions giving the beneficiary a right upon the death of the depositor, it was forced either to abandon its insistence on due testamentary form, which had been but lately reasserted in a bank deposit case,[13] or to find that a trust was created in conformance with the depositor's assumed intention, that is, with a power to revoke in whole or in part. The latter, it has been said,[14] is the meaning of the following rule laid down: "A deposit by one person * * * as trustee for another, standing alone, * * * is a tentative trust merely, revocable at will, until the depositor dies or completes the gift * * * by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary."[15] A majority of the court in *Matter of U. S. Trust Co.*,[16] however, interpreted this rule to mean that the deposit, standing alone, is inchoate and gives the beneficiary no present right or title. Yet the same court assumed that a right might be enforced after the depositor's death upon the ground that the *trust* had not been *revoked*.[17] The theory of a revocable trust is imperative unless lack of testamentary form is to be waived. But on any theory, the New York law is anomalous from the standpoint of the orthodox trust.

In a recent case it appeared that the depositor did not intend possession of the funds to be given until his death, and, though he had notified the beneficiary of the deposit, the property was subjected to a transfer tax. *In re Pierce's Estate* (1908) 112 N. Y. Supp. 594. This decision is correct in holding that the intention of the depositor determines the nature of the beneficiary's interest. Notice does not conclusively give a present right to the possession of the funds, or make the trust irrevocable.[18] The rule laid down by *Matter of Totten*,[19] in providing for the disposition of the bank balances of a depositor, whose intention has not been made clear by the form of the deposit, requires *unequivocal* evidence that he intended to invest another with a present right in his property. It is probable that the courts in seeking to ascertain and enforce this intention will feel themselves bound by no particular theory of a "tentative trust."

NATURE OF THE LIABILITY AT LAW FOR NECESSARIES.—The liability for necessaries supplied to married women, infants, and insane persons, is well settled, but its basis is by no means clearly or uniformly established. An infant was early held liable in an action of debt for necessaries.[1] The requisite *quid pro quo* was present and the courts considered good the replication, "necessaries," to a plea of infancy, for the obvious reason that only if compelled to pay, could the infant supply his wants. The same replication seems, for like considerations, later to have been held sufficient

[13]Sullivan *v.* Sullivan, *supra.*

[14]Matter of U. S. Trust Co. (1907) 117 App. Div. 178, *per* Ingraham, J., dissenting.

[15]Cuff *v.* Cuff (1907) 120 App. Div. 225.

[16]Tierney *v.* FitzPatrick (1907) 122 App. Div. 623; O'Brien *v.* Bank (1905) 101 App. Div. 108.

[1]Y. B. 18 Edw. IV, 2; 10 Henry VI, 14.